



***State of New Mexico
General Services Department
Risk Management Division***

***Claims Settlement Process Assessment Report
For the Years Ended June 30, 2015, 2018 and 2019***



October 3, 2019

Honorable Brian S. Colón, Esq., New Mexico State Auditor
Ken F. Ortiz, Cabinet Secretary, General Services Department
Clinton Nicley, Director of Risk Management, General Services Department

The Risk Management Division (RMD) of the General Services Department (GSD) engaged Kubiak Melton & Associates, LLC ("KMA CPAs") to perform an assessment of processes and procedures surrounding claim settlements administered by RMD, pursuant to a contract executed July 26, 2019. The assessment scope initially included reviewing specific settlements made during fiscal year 2019. The scope was expanded during the course of the engagement to also include settlements made during fiscal year 2015 and fiscal year 2018. The population identified by GSD and the Office of the State Auditor (OSA), was selected to ensure proper sample size determinations were considered to allow for empirical observations. As part of the engagement, KMA CPAs considered the historical application of procedures and tested those historical procedures against the settlements reviewed. The goal of the assessment was to ensure compliance with state and federal laws, statutes, regulations, and policies and procedures.

The assessment was performed in accordance with statement on standards for consulting services established by the American Institute of Certified Public Accountants (AICPA), the Audit Act (NMSA 1978, Sections 12-6-1 through 12-6-14) and the Audit Rule (2.2.2 NMAC). The assessment was designed to provide the GSD's RMD with insight into compliance with policies and procedures during the fiscal years 2015, 2018 and 2019 and recommendations for improvements to the claim settlement process. The assessment was not performed to evaluate the merit or lack thereof specific to cases reviewed or determine if the amounts of certain settlements were in the best interest of the State. It is important to note our recommendations for policies and procedures may be implemented and included in the new Risk Management Information System (RMIS).

The consulting procedures under this engagement performed by KMA CPAs do not constitute an examination, investigation, or an audit performed in accordance with U.S. Generally Accepted Auditing Standards (GAAS), the objective of which would be the expression of an opinion on the items outlined in our *Objective and Scope* or on the financial statements of the entity taken as a whole. Our responsibility under this engagement was not to detect fraud. Therefore, we express no opinion or give any other form of assurance.

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KMA CPAs and the OSA wish to take this opportunity to express our sincere appreciation for all the courtesies and cooperation extended to us by the management and staff and thank you for the opportunity to be of service.

Kubiak Melton & Associates, LLC

Kubiak Melton & Associates, LLC
Auditors – Business Consultants – CPAs

Albuquerque, New Mexico
October 3, 2019

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Executive Summary:

Designation

On May 24, 2019, State Auditor Brian S. Colón, Esq. designated the Risk Management Division (RMD) of New Mexico's General Services Department (GSD) for a special audit to examine State settlements. Information was made public regarding certain settlement payments in the recent fiscal years and allegations that process was not followed for millions of dollars in settlement payments disbursed by GSD's RMD with state funds.

The engagement examined a total of eighteen (18) specific claims settled by GSD's RMD during fiscal years 2015, 2018, and 2019, amounting to a total of \$5,025,000 disbursed by GSD's RMD, to determine if settlements complied with statutes, regulations and policies and procedures.

These specific settlements were selected due to substantial public interest, associated media scrutiny, or for comparison purposes. In order to independently review these claims and to promote accountability and transparency, the State Auditor designated GSD's RMD for a special audit on May 24, 2019.

Pursuant to NMSA 1978, Section 12-6-3(C) of the Audit Act, the State Auditor "may cause the financial affairs and transactions of an agency to be audited in whole or in part." Additionally, in accordance with the Audit Rule, at 2.2.2.15 NMAC, the State Auditor may initiate a special audit regarding the financial affairs and transactions of an agency or local public body based on the information it receives. This special audit was joint engagement between Kubiak Melton & Associates, LLC ("KMA CPAs") and the Office of the State Auditor (OSA).

This examination included a review of current and historical processes of GSD's RMD in order to identify risks, noncompliance and/or weaknesses. This report includes opportunities for improvement in the form of recommendations.

The consultation was limited to the areas and periods described and limited to the documents available and interviews performed.

General Services Department's Risk Management Division – Mission

The State of New Mexico's GSD was created to increase the efficiency of and consolidate certain governmental functions in support of other state government agencies. The executive of the GSD, referred to as the Secretary, is appointed by the governor and is a member of the governor's cabinet. The GSD's RMD is responsible for insuring against, processing and paying for claims against entities served by the GSD. As stated in its mission, RMD is responsible for protecting and conserving the State's human and physical resources and financial assets.

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As part of this engagement, KMA CPAs and the OSA obtained a detailed understanding of RMD's purpose as a division of GSD, and as an important part of New Mexico's state government. In order to provide context, we included RMD's mission statement below:

"Protecting the State of New Mexico's human, physical, and financial assets"

"The Risk Management Division (RMD) was created by the NM Legislature to protect and conserve the state's human and physical resources and financial assets. RMD provides multi-line insurance coverage programs, employee health benefits programs, loss prevention and control initiatives, dispute prevention and resolution services, and legal defense for the State of New Mexico. The depth and breadth of RMD's programs is substantial and reaches across all of state government. Covered entities include state agencies and employees, boards and commissions, schools and universities, and participating school districts and local public bodies. These covered entities are diverse in their composition and concerns, and present new challenges in an ever-changing risk environment; they also present opportunities for creative strategies and leveraging of existing resources. *RMD proudly serves the following customers; State Employees, Local Public Bodies, Public Schools and Institutions of Higher Education.*"

Summarized Results

The engagement resulted in three (3) findings and twelve (12) observations. The findings include lack of documentation, excessive confidentiality periods, and excessive liquidated damages provisions. The observations included as opportunities, reveal checks issued prior to execution of settlement agreements, a clause requiring settlement funds to be used to repay personal debt, settlements paid prior to finalization of investigative report, lack of support for settlement amounts, and other important process recommendations.

The following table summarizes the findings:

Finding #	Description:	Dollar Amount of Related Settlements:
CS 2019-001	Lack of Documentation in Settled Case Files	\$2,775,000
CS 2019-002	Extensions of Confidentiality Periods	\$2,100,000
CS 2019-003	Excessive Liquidated Damages Provisions	\$875,000

Summarized Recommendations:

- GSD's RMD should establish controls and implement internal monitoring processes to ensure policies and procedures and statutory requirements are adhered to. Internal controls are necessary to protect the process and funds being disbursed.

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- GSD's RMD should ensure formal written policies and procedures are established, implemented, and understood regarding supporting documentation for all types of settlements.
- The New Mexico Legislature should take appropriate measures to ensure the statutory authority of GSD's RMD and other requirements are well defined and clearly reflect legislative intent.
- GSD's RMD should establish a requirement for, and policies and procedures relating to, a documented second review and/or approval/concurrence for all settlements and claims.
- GSD's RMD should establish policies and procedures to ensure adherence to settlement confidentiality statutes. These policies and procedures should include required written file documentation justifying any departure from normal requirements.

GSD's RMD provided responses to each audit finding. The responses are included in the *Schedule of Findings and Recommendations*. RMD's management has also included responses to identified opportunities presented in this report.

Definitions:

In performance of this engagement, we have included definitions of the following settlement types for context:

Auto Liability – Automobile liability insurance is financial protection for a driver who, while operating a vehicle, harms someone else or their property. Automobile liability insurance only covers injuries or damages to third parties and their property, not to the driver or the driver's property.

Civil Rights – The Civil Rights Act of 1964 is organized into 11 sections (titles). Relevant sections include:

- Title I: Prohibits unequal application of voter registration requirements. Requirements such as literacy tests had been used to suppress black voters, other minorities and poor whites. These were not outlawed, the law stipulated that any qualification tests had to be applied to every voter. Qualifications other than citizenship were outlawed a year later.
- Title II: Outlawed discrimination based on color, race, religion or national origin in restaurants, theaters, hotels and motels, as well as all other public accommodations involved in interstate commerce. Private clubs were exempt.
- Title III: Prohibits state and local governments from denying access to public property and facilities based on color, race, religion or national origin.

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- Title IV: Provides the basis for the desegregation of public schools.
- Title V: Provides for the expansion of the Civil Rights Commission that was established by the earlier Civil Rights Act of 1957.
- Title VI: Prohibits discrimination by government agencies that receive federal funds under penalty of losing such funding.

General Liability – General liability insurance can help cover medical expenses and attorney fees resulting from bodily injuries and property damage for which your company may be legally responsible.

Law Enforcement – Police officer liability insurance is a form of professional liability insurance that covers officers, departments, and municipalities against lawsuits that arise as a result of acts, errors, and omissions while police officers are performing their professional duties.

Medical Malpractice – Medical malpractice insurance is a type of errors and omissions (E&O) coverage. It protects physicians and other healthcare professionals against claims alleging their negligent acts caused injury to patients. It is also called medical professional liability insurance.

Statutes and Regulations:

In performance of this engagement, we have included descriptions of the following statutes and regulations for context:

Risk Management Division (NMSA 1978, §§ 15-7-1 through 15-7-11) – an article that established the GSD's RMD. NMSA 1978, Section 15-7-9 sets forth that records of the GSD's RMD pertaining to claims for damages or other relief against any governmental entity or public officer or employee are confidential and not subject to any right of inspection by any person not a state officer, member of the legislature or state employee acting within the scope of official duties, provided, however, that such records are subject to public inspection one hundred eighty (180) days after the latest of the enumerated dates related to the running of the applicable statutes of limitation, or conclusion of litigation, or full and final settlement of the claim, or the date the claim has been placed on closed status.

Tort Claims Act (NMSA 1978, §§ 41-4-1 through 41-4-27) – an act that waives governmental immunity and allows individuals to file a claim or lawsuit against a state or local governmental entity. It establishes limitations to the government liability. The act also establishes the Public Liability Fund and authorizes RMD to expend monies from the fund to settle claims pursuant to NMSA 1978, Section 41-4-23.

Whistleblower Protection Act (NMSA 1978, §§ 10-16C-1 through 10-16C-4) – an act that applies to civil actions for damages resulting from retaliatory action by a public employer against a public employee for providing information about, or refusing to participate in, an unlawful or improper act.

Retention and Disposition of Public Records (1.21.2.162 NMAC) – a regulation issued by the State Commission of Records that establishes the record and disposition retention requirement for General Liability Claims in accordance with the Public Records Act, NMSA 1978, Section 14-3-1, *et seq.* The retention requirement set forth in administrative code is three (3) years from the date the file was closed for general liability claims.

Objective and Scope:

The objective of our engagement was to provide GSD's RMD with insight into compliance with policies and procedures regarding certain settlement transactions that occurred during fiscal years 2015, 2018, and 2019 and to make recommendations for improvements to the claim settlement process. It is important to note our recommendations for policies and procedures were made with the consideration that they may be implemented and included in the new Risk Management Information System (RMIS). These recommendations are included in the "Areas of Opportunities" Section of this report.

As required by our agreements, we performed the following procedures:

1. Established an understanding of the formal and informal processes, procedures and internal controls for any payments/disbursements/payables (cash, check, ACH, etc.) made and used by the GSD's RMD during fiscal years 2015, 2018, and 2019 to administer claims, negotiate settlements and make payments to affected parties.
2. Obtained general ledger detail of all settlement expenditures (Public Liability Fund) from the GSD's RMD for fiscal years 2015, 2018, and 2019. Reviewed files and supporting documentation for the settlement process related to the identified sample, tested for state and federal compliance with statutes, regulations, and policies and procedures.
3. Any additional procedures requested by the OSA and/or GSD's RMD. Additional procedures included an expansion of scope to review other settlements, some of which were prior to fiscal year 2019.

Procedures that resulted in the identification of violations, weaknesses, or noncompliance are reported as findings in this report. Items identified as areas that may benefit from improvement, yet do not rise to the level of a finding, are reported as opportunities in this report. Additional tasks performed as part of the engagement are listed below:

- We provided the definitions of the types of claims handled by RMD and compiled the data to illustrate the following:
 - Percentage of settlement amounts by loss type for fiscal year 2019

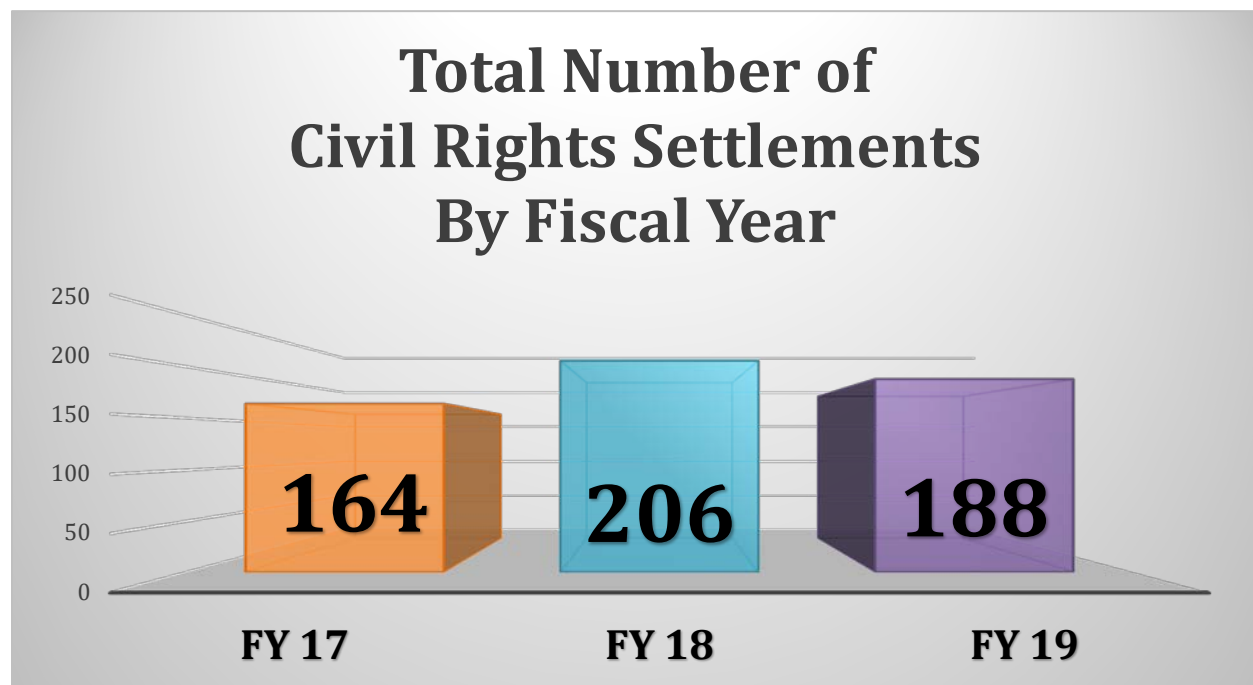
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- Percentage of claim types for fiscal year 2019
- Range of individual settlement amounts
 - Less than \$25,000 (See page 16)
 - \$25,000 to \$250,000 (See page 16)
 - Greater than \$250,000 (See page 17)
- We requested meetings with certain former key personnel and plaintiff's attorneys in an effort to identify any additional pertinent information that may have not been in GSD's possession. We received a limited number of responses to these requests.
- We performed procedures to obtain an understanding of adherence to confidentiality requirements in order to learn how GSD's RMD complies with related statutes. It is pertinent to ascertain what governs GSD's RMD's confidentiality requirements outside of the 180 days required by NMSA 1978, Section 15-7-9(A)(2), if any. This review resulted in finding CS 2019-002, reported in the *Schedule of Findings and Recommendations*.
- KMA CPAs tested for state and federal compliance with statutes, regulations, policies and procedures and identified items that were either in noncompliance or a deviation from best practices. This review resulted in findings CS 2019-001, CS 2019-002, and CS 2019-003, reported in the *Schedule of Findings and Recommendations*.
- We identified areas for opportunities in which GSD's RMD could strengthen their policies, procedures, and internal controls surrounding the claims and settlements process. This review resulted in observations from Opportunity 1 through Opportunity 12, reported in the *Areas of Opportunity for Improvement*.

Settlement Data:

Figure 1: GSD's RMD Civil Rights Cases Settled for Fiscal Years 2017 – 2019¹

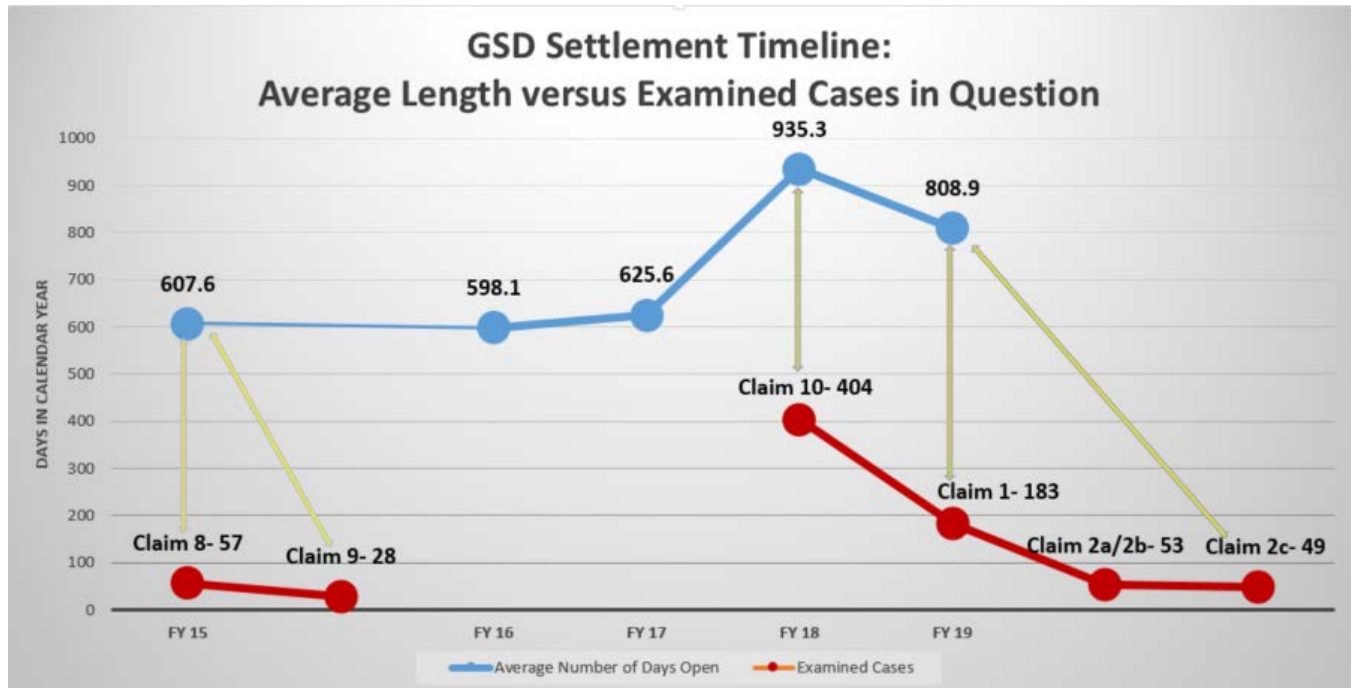
Data provided by GSD's RMD over the past three fiscal years displays the total number of settled civil rights claims per fiscal year ranged anywhere between one-hundred sixty-four (164) and two hundred six (206). The table below indicates the figures provided by GSD:



¹ Source data provided by GSD. Cases settled indicates affirmative claims were paid out in the fiscal year specified resulting in the conclusion of the dispute.

Figure 2: Quantitative Comparison of GSD's RMD Settlement Timelines²

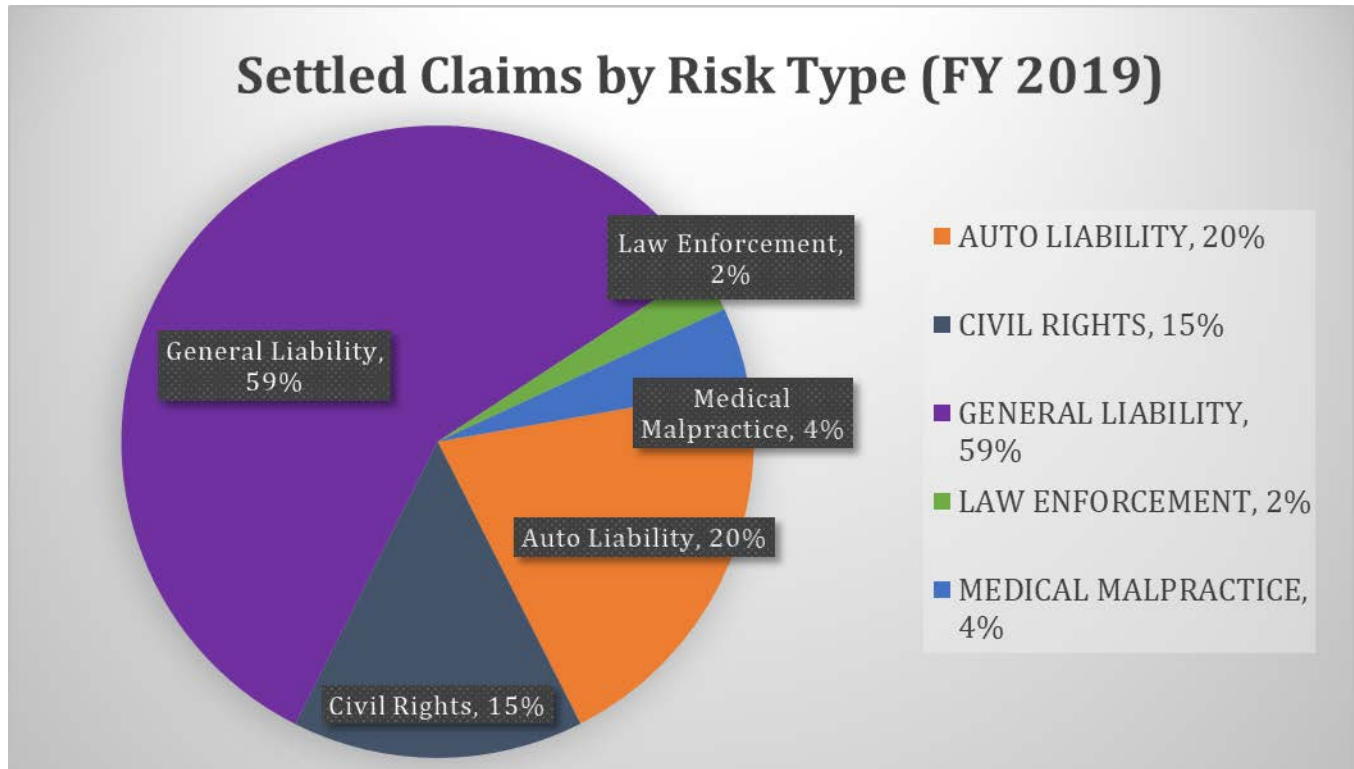
This chart compares the average number of days to settlement of total civil rights claims compared to the number of days to settlement of civil rights claims examined during this engagement. The average number of days cases remained open compared to the complaints examined varied significantly.



² Source data provided by GSD's RMD. The chart provides a comparison of the average timeline by GSD's RMD on the settlement process versus the time spent by GSD's RMD on other cases in the same fiscal year.

Figure 3: Percentage of Settled Claims by Risk Type³

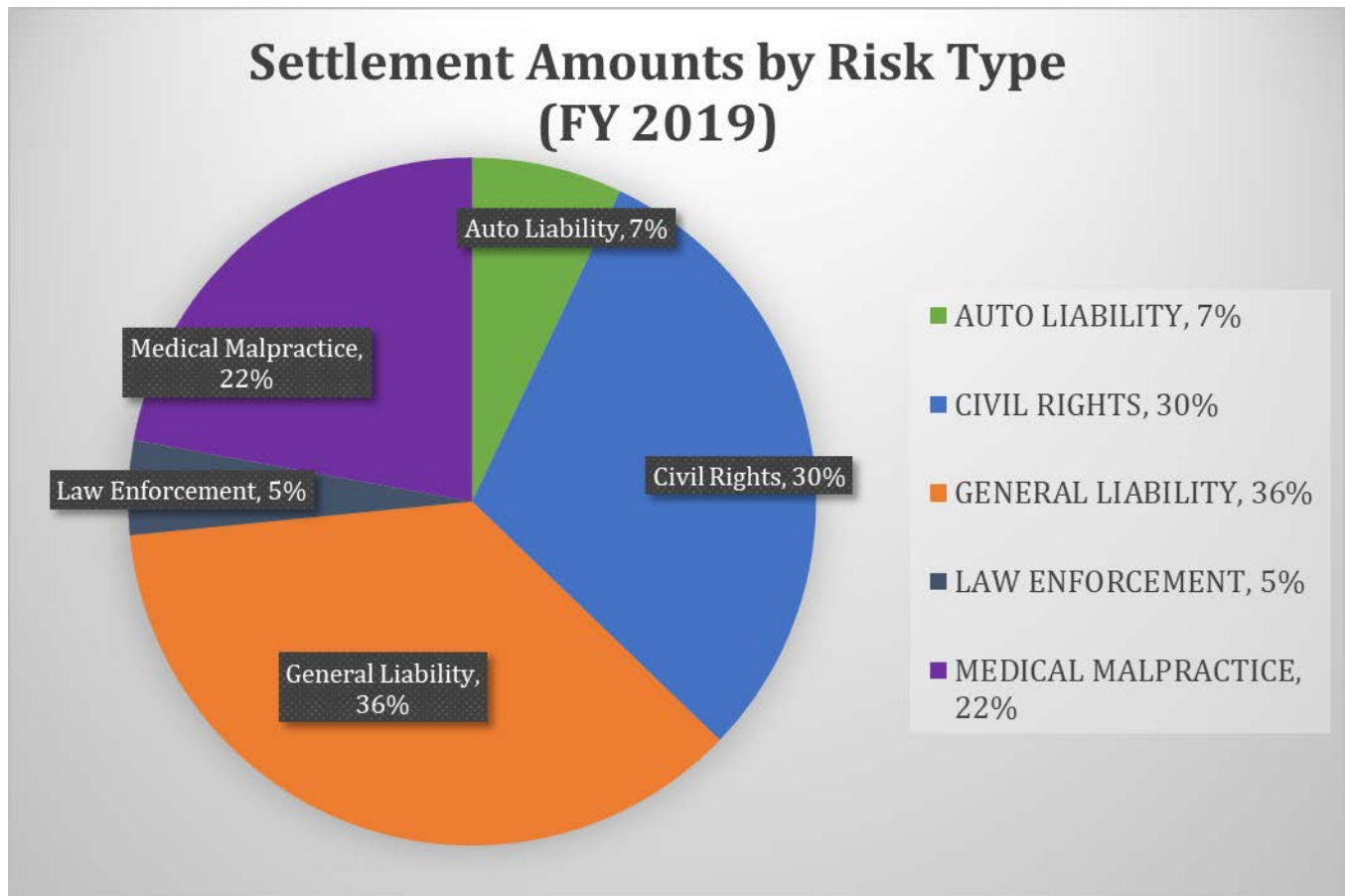
This chart reflects the percentage of total settlements in fiscal year 2019 by risk type. The majority of the number of settlements are related to General Liability claims.



³ Source data provided by GSD. The chart details the percentage of settlements in fiscal year 2019 based on risk type.

Figure 4: Percentage of Settlement Amounts by Payment Category for Fiscal Year 2019 (Total RMD Claims Paid for Fiscal Year 2019 – \$18,404,552)⁴:

This chart reflects the percentage of total settlement amounts by risk type for fiscal year 2019. The majority of the settlement amounts are related to General Liability claims.

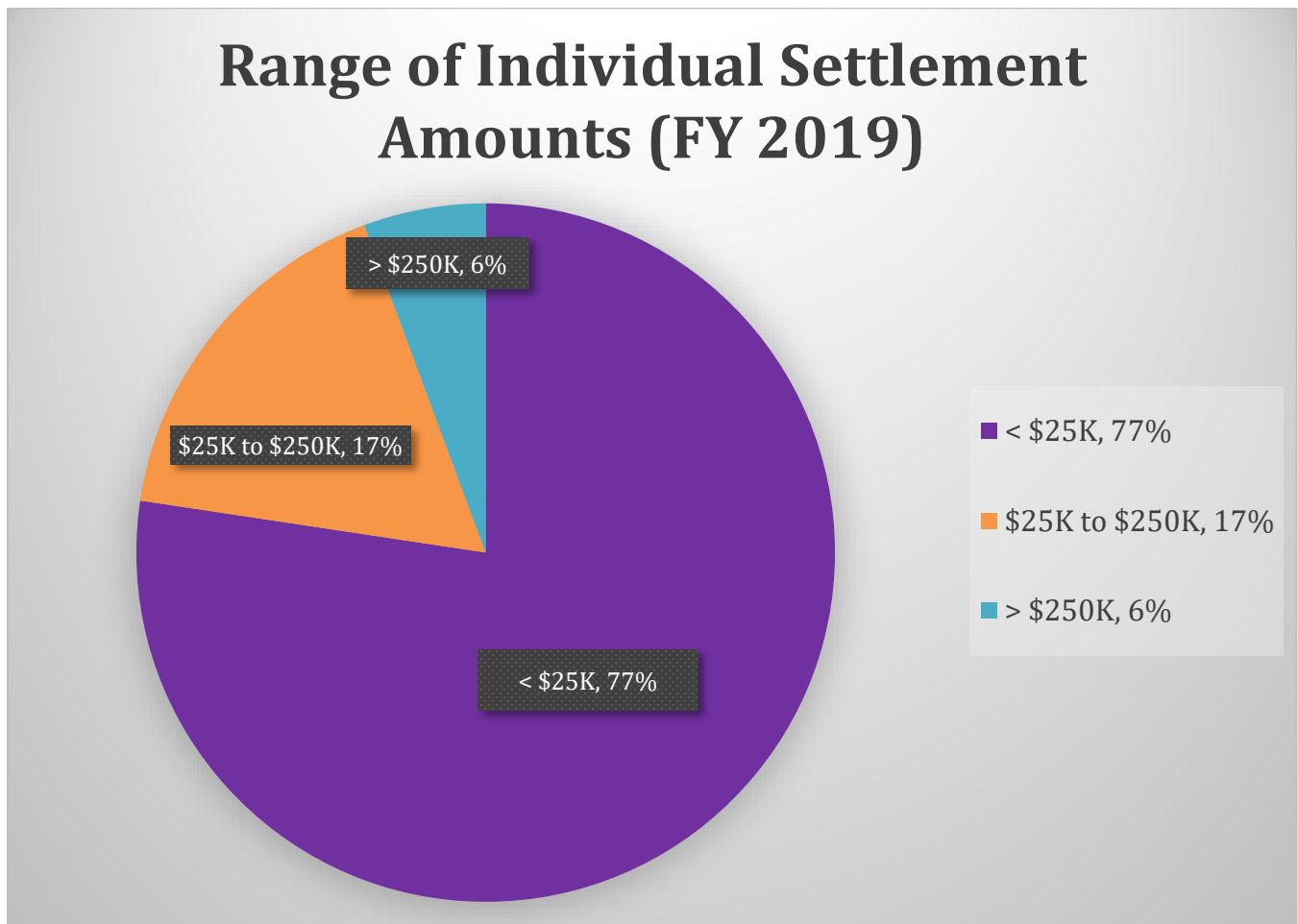


⁴ Source data provided by GSD. The chart details the percentage of total settlement amounts based on risk type for fiscal year 2019.

Figure 5: Range of Individual Settlement Amounts for Fiscal Year 2019⁵:

This chart reflects the range of settlement amounts for fiscal year 2019 based upon the three established ranges of settlement amounts:

- Less than \$25,000
- \$25,000 to \$250,000
- Greater than \$250,000



⁵ Source data provided by GSD. The chart details the range of settlement amounts based on three categorical ranges for fiscal year 2019.

Overview of Claims Reviewed:

We reviewed ten (10) claims that resulted in eighteen (18) settlements on behalf of various agencies. The eighteen (18) settlements were grouped into ten (10) separate claims due to the fact that multiple individual claims were brought as a single claim and were settled as one settlement in each applicable instance. Out of the eighteen (18) settlements, six (6) were settled in fiscal year 2015, one (1) was settled in fiscal year 2018, and eleven (11) were settled in fiscal year 2019. These claims were selected for review by the OSA. Determining factors related to selection included a high demand of Inspection of Public Records Act (IPRA) requests surrounding these items and KMA CPAs and the OSA's responsibility to gain an objective understanding of the facts and circumstances related to these settlements. We reviewed all documents provided by the GSD's RMD for these specific settlements to ascertain the facts including amounts, timelines and conclusions. Furthermore, we tested for state and federal compliance with statutes, regulations, and policies and procedures. The results of such are reported in the *Schedule of Findings and Recommendations*:

Claim 1: Complaint to recover compensatory and punitive damages based on gender and sexual orientation discrimination, retaliation and whistleblowing activities.

- i. Complainant 1a – Settlement with the Department of Public Safety (DPS) in the amount of \$300,000
- ii. Complainant 1b – Settlement with the DPS in the amount of \$300,000
- iii. Complainant 1c – Settlement with the DPS in the amount of \$300,000

Claim 2: U.S. Equal Employment Opportunity Commission Charge of Discrimination based on sex, retaliation and age.

- i. Complainant 2a – Settlement with the DPS in the amount of \$400,000
- ii. Complainant 2b – Settlement with the DPS in the amount of \$300,000
- iii. Complainant 2c – Settlement with the DPS in the amount of \$300,000

Claim 3: Complaint to recover punitive damages based on excessive force, false arrest, false imprisonment, and unlawful seizure of property.

- i. Complainant 3 – Settlement with the DPS in the amount of \$925,000.

Claim 4: Complaint to recover punitive damages based on wrongful death.

- i. Complainant 4 – Settlement with the DPS in the amount of \$400,000

Claim 5: Complaint to recover compensation and punitive damages based on unlawful termination and retaliation.

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- i. Complainant 5 – Settlement with the Department of Military Affairs (DMA) in the amount of \$300,000.

Claim 6: Complaint to recover compensation and punitive damages based on violations of the *Family and Medical Leave Act*, retaliation, and wrongful termination.

- i. Complainant 6 – Settlement with the University of New Mexico Hospital (UNMH) in the amount of \$225,000.

Claim 7: Complaint to recover compensation and punitive damages based on whistleblower activities and violations of the IPRA.

- i. Complainant 7 – Settlement with the Department of Health (DOH) in the amount of \$150,000.

Claim 8: Complaint to recover compensatory and punitive damages based upon whistleblowing, harassment and retaliation.

- i. Complainant 8 – Settlement with the DPS in the amount of \$200,000
- ii. Comparative Cases Reviewed – The OSA requested and reviewed three additional claims handled by the GSD's RMD former Director, in place during the time period of Claim 8, for comparison to the Claim 8 settlement process. Comparative cases were requested in order to analyze the variances in settlement process followed. Two of three claims were dismissed in court, while the third was litigated successfully and required GSD's RMD to cover legal expenses totaling \$3,362.60.

Claim 9: Complaint to recover compensatory and punitive damages based upon on gender and sexual orientation discrimination, retaliation and whistleblowing activities.

- i. Complainant 9a – Settlement with DFA in the amount of \$105,000
- ii. Complainant 9b – Settlement with DFA in the amount of \$70,000
- iii. Complainant 9c – Settlement with DFA in the amount of \$140,000
- iv. Complainant 9d – Settlement with DFA in the amount of \$160,000 (FY2015)
- v. Complainant 9e – Settlement with DFA in the amount of \$200,000

Claim 10: Complaint to recover compensatory and punitive damages based upon gender, race and national origin discrimination and whistleblowing activities.

Complainant 9d – Settlement with DFA and the NMCD in the amount of \$100,000 (FY2018)

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Table 1

The tables presented on the following pages summarize the cases reviewed and, if applicable, identify where exceptions to a process, rule or statute were noted in the respective finding (and referenced in the finding column).

The results of the procedures specific to each case are presented by case number and follow the "Overview of Settlement Claims Examined" table.

Table 1: Overview of Settlement Claims Examined

Claim	Open Date	Type of Claims/Complaints	Defendant	Settlement Date	Amount	Days Until Settlement	Settlement Execution Date	Check Invoice Date	Findings
Complaint 1a	6/12/2018	Complaint to Recovery Compensatory and Punitive Damages Based on Gender and Sexual Orientation Discrimination, Retaliation and Whistleblowing Activities	NM DPS and former DPS State Police Chief	12/12/2018	\$ 300,000.00	183	12/12/2018	1/25/2019	CS 2019-001; CS 2019-002
Complaint 1b	6/12/2018	Complaint to Recovery Compensatory and Punitive Damages Based on Gender and Sexual Orientation Discrimination, Retaliation and Whistleblowing Activities	NM DPS and former DPS State Police Chief	12/12/2018	\$ 300,000.00	183	12/12/2018	1/25/2019	CS 2019-001; CS 2019-002
Complaint 1c	6/12/2018	Complaint to Recovery Compensatory and Punitive Damages Based on Gender and Sexual Orientation Discrimination, Retaliation and Whistleblowing Activities	NM DPS, former DPS State Police Chief	12/12/2018	\$ 300,000.00	183	12/12/2018	1/25/2019	CS 2019-001; CS 2019-002
Complaint 2a	11/12/2018	U.S. Equal Employment Opportunity Commission Charge of Discrimination Based on Sex, Retaliation and Age	NM DPS, former DPS State Police Chief and former Cabinet Secretary	1/4/2019	\$ 400,000.00	53	1/4/2019	2/5/2019	CS 2019-001; CS 2019-002
Complaint 2b	11/12/2018	U.S. Equal Employment Opportunity Commission Charge of Discrimination Based on Sex, Retaliation and Age	NM DPS, former DPS State Police Chief and former Cabinet Secretary	1/4/2019	\$ 300,000.00	53	1/4/2019	2/5/2019	CS 2019-001; CS 2019-002
Complaint 2c	11/16/2018	U.S. Equal Employment Opportunity Commission Charge of Discrimination Based on Sex, Retaliation and Age	NM DPS, former DPS State Police Chief and former Cabinet Secretary	1/4/2019	\$ 300,000.00	49	1/4/2019	2/5/2019	CS 2019-001; CS 2019-002

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Table 1: Overview of Settlement Claims Examined (continued)

Claim	Open Date	Type of Claim s/Complaints	Defendant	Settlement Date	Amount	Days Until Settlement	Settlement Execution Date	Check Invoice Date	Findings
Complaint 3	6/21/2017	Complaint to recovery Punitive Damages based upon false imprisonment, unlawful seizure of property, assault, battery and excessive force.	NM DPS	1/24/2019	\$ 925,000.00	583	1/25/2019	2/13/2019	
Complaint 4	8/6/2018	Complaint to recovery punitive damages based upon wrongful death, negligent training and loss of consortium.	NM DPS	1/16/2019	\$ 400,000.00	163	1/16/2019	1/16/2019	
Complaint 5	11/6/2012	U.S. Equal Employment Opportunity Commission charge of retaliation and whistleblowing activities.	NM DMA and NM SPO	11/3/2018	\$ 300,000.00	2,198	11/13/2018	11/20/2018	
Complaint 6	12/9/2016	Complaint to recover compensatory and punitive damages based upon violations of the Family Medical Leave Act (FMLA) and wrongful termination.	UNMH	11/28/2018	\$ 225,000.00	727	12/6/2018	11/19/2018	
Complaint 7	5/1/2018	Complaint to recover compensatory and punitive damages based upon whistleblower activities and violations of IPRA.	DOH and Individual	10/19/2018	\$ 300,000.00	171	10/19/2018	11/2/2018	
Complaint 8	2/26/2015	Complaint to recover compensatory and punitive damages based upon whistleblowing, harassment and retaliation.	NM DPS	4/24/2015	\$ 200,000.00	57	4/24/2015	4/23/2015	CS 2019-001; CS 2019-002; CS 2019-003

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Table 1: Overview of Settlement Claims Examined (continued)

Claim	Open Date	Type of Claims/Complaints	Defendant	Settlement Date	Amount	Days Until Settlement	Settlement Execution Date	Check Invoice Date	Findings
Complaint 9a	10/6/2014	U.S. Equal Employment Opportunity Commission Charge of Discrimination Based on Sex, retaliation and w histle blow ing activities.	NM DFA	11/14/2014	\$ 105,000.00	28	11/3/2014	11/13/2014	CS 2019-001
Complaint 9b	10/6/2014	U.S. Equal Employment Opportunity Commission Charge of Discrimination Based on Sex, retaliation and w histle blow ing activities.	NM DFA	11/14/2014	\$ 70,000.00	28	11/3/2014	11/13/2014	CS 2019-001
Complaint 9c	10/6/2014	U.S. Equal Employment Opportunity Commission Charge of Discrimination Based on Sex, retaliation, sexual orientation and w histle blow ing activities.	NM DFA	11/14/2014	\$ 140,000.00	28	11/3/2014	11/13/2014	CS 2019-001
Complaint 9d	10/6/2014	U.S. Equal Employment Opportunity Commission Charge of Discrimination Based on Sex, national origin, retaliation and w histle blow ing activities.	NM DFA	11/14/2014	\$ 160,000.00	28	11/3/2014	11/13/2014	CS 2019-001
Complaint 9e	10/6/2014	U.S. Equal Employment Opportunity Commission Charge of Discrimination Based on Sex, retaliation, age and w histle blow ing activities.	NM DFA	11/14/2014	\$ 200,000.00	28	11/3/2014	11/13/2014	CS 2019-001
Complaint 10	6/1/2017	U.S. Equal Employment Opportunity Commission Charge of Discrimination Based on Sex, national origin, retaliation and w histle blow ing activities.	NM DFA and NMCD	8/14/2018	\$ 100,000.00	439	8/14/2018	7/3/2018	N/A

Results:

Schedule of Findings and Recommendations:

CS 2019-001 – Lack of Documentation in Settled Case Files

Condition: Twelve (12) settlements totaling \$2,775,000 from Claims 1, 2, 8, and 9 lacked supportive documentation in the following areas:

- Request for Authority (RFA) – RFA should include detailed estimates of cost to litigate utilized to arrive at the final settlement by GSD's RMD (attorney fees, discovery, future claims, analysis of extrapolation of fees and costs to date, etc.).
- An absence of an investigation report into each complainant's detailed allegations.
- An absence of documentation detailing justification for settlement recommendation and the basis for the amounts disbursed.

Criteria: The Committee of Sponsoring Organizations (COSO) internal control integrated framework consists of five critical elements that must be present in carrying out the achievement objectives of an organization. These elements are known as the control environment, risk assessment, control activities, information and communication, and monitoring. Furthermore, "The absence of records can open agency employees to accusations of fraud, waste or abuse, impropriety, political embarrassment and an inability to successfully defend the state in cases of legal action or claims against the government." 1.13.3.10(A)(1) NMAC.

Effect: Lack of vital documents in the case file that support how GSD's RMD reached a decision to settle cases and disburse state funds. Due to the lack of documentation there may be insufficient evidence to support the amount of the settlements is in the best interest of the state.

Cause: It is unclear why certain documents were retained, while others may not have been retained. A lack of written policies and procedures coupled with broad authority in statute may have contributed to lacking documentation to support the conclusion of a claim. At the time of these settlements, GSD's RMD did not require a documented second review and/or approval/concurrence for settlements and claims made between \$25,000 and \$250,000 by someone other than the GSD's RMD Director.

Recommendation: All settlements should be supported by documentation that substantiates RMD's decisions and disbursements of funds. This documentation should provide support for the conclusions drawn by the person(s) handling the case. This supporting documentation should be saved in the RMIS file to support disbursement of State funds.

Management's Response: Internal recordkeeping procedure is of vital importance, particularly when the records in question regard settlements that contemplate taxpayer dollars. While RMD's statutory authority to settle or litigate cases is indeed broad, it is imperative that the steps leading to an exercise of such authority are both legally and actuarially sound. Beginning in early 2019, the RMD reviewed and

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modified the procedures to require supportive documentation. In addition, RMD issued a new legal services request for proposals (RFP) in September of this year. The updated set of deliverables includes: an Initial Risk Analysis, Quarterly Status Reports, and Litigation Risk Analyses. These documents will be used to form internal staff's opinions as to whether investigations, dispositive motions practice, litigation, or settlements are warranted. Ultimately, before a settlement is facilitated, staff is responsible for issuing a request for authority to management. In all such cases, staff is trained and bears responsibility for file management for their individual caseload. RMD is currently working on a new Risk Management Information System (RMIS) that will make this process more straightforward. Staff will continue to manage files in accordance with new internal procedures implemented earlier this year to ensure case information is adequately and regularly updated.

CS 2019-002 – Excessive Confidentiality Periods Stipulated in Settlement Agreements Violated Statutory Requirements

Condition: In seven (7) instances, GSD's RMD agreed to and included within the settlement agreements an excessive confidentiality period that exceeded the statutory limitation of one hundred eighty (180) days without documented justification. Settlements from *Claim 1* and *Claim 2* contained a four and a half (4.5) year confidentiality agreement with no documented justification. The *Claim 8* settlement was void of the standard State settlement agreement provisions setting forth the requirements of the confidentiality of records statute (NMSA 1978, § 15-7-9). The covenant of confidentiality provision in the agreement extends indefinitely and appears to circumvent the confidentiality of records statute. It is unclear whether this provision of the settlement agreement is attempting to require permanent confidentiality, as it omits all reference to NMSA 1978, Section 15-7-9.

In the claims referenced above, the covenant of confidentiality stated the parties "shall not disclose any details underlying or otherwise associated with the claims referred to in the correspondence directed to the State of New Mexico's Risk Management Division...." Extensions of confidentiality periods affected settled cases totaling \$2,100,000.

Criteria: Per NMSA 1978, Section 15-7-9(A)(2): "Records pertaining to claims for damages or other relief against any governmental entity or public officer or employee; provided such records shall be subject to public inspection by New Mexico citizens one hundred eighty days after the latest of the [enumerated dates]".

Effect: Failure to produce these records after the required one hundred eighty (180) days is in violation of the law. Settlement agreements violated New Mexico Law by extending the confidentiality period.

Cause: GSD's RMD included a four-and-a-half (4.5) year confidentiality agreement for Claims 1 and 2 and an indefinite confidentiality agreement for Claim 8, the justification of which was not documented in the case file.

Recommendation: GSD's RMD should ensure that all settlement agreements follow state statutes prior to execution. We recommend the Legislature review the applicable statutes and make appropriate changes to ensure Legislative intent is achieved.

Management's Response: Under the current administration, RMD does not draft or execute settlement agreements that call for confidentiality clauses that impermissibly extend the period provided for in statute. Starting in July of this year, RMD and the GSD convened a working group to discuss clarification efforts to the law, which will include recommendations for the Legislature to consider a statutory change. Discussion thus far has focused primarily on removing the ability of future actors to interpret statute in such a way that prevents public access to expenditure of taxpayer dollars. In August, RMD began the public posting of settlements online for those matters that had reached the end of the confidentiality period articulated in statute. RMD will urge legislation to codify a requirement that all RMD settlements be posted on a publicly available website.

CS 2019-003 – Excessive Liquidated Damages Provisions for Breach of Covenant of Confidentiality

Condition: The *Claim 8* settlement agreement included a \$50,000 liquidated damages assessment for any breach of the covenant of confidentiality provisions included in the executed settlement agreement. A breach would have to be caused by the claimant, their attorneys and any other person acting on behalf of the complainant. It does not apply to any other parties, including GSD's RMD. This liquidated damages provision exceeded the allowed liquidated damages assessment by \$49,000.

The *Claim 9* settlement agreements also contained provisions for \$5,000 in liquidated damages for violations of the covenant of confidentiality. Each of these five (5) settlements exceeded the allowed liquidated damages assessment by \$4,000 for a collective amount of \$20,000.

Criteria: Per NMSA 1978, Section 15-7-9(A)(2): "[r]ecords pertaining to claims for damages or other relief against any governmental entity or public officer or employee [...] shall be subject to public inspection by New Mexico citizens one hundred eighty days after the latest of the [specifically enumerated dates]". Per NMSA 1978, Section 15-7-9(C): "Any person who reveals records protected pursuant to Subsection A of this section to another person in violation of this section is guilty of a misdemeanor and shall, upon conviction, be fined not more than one thousand dollars (\$1,000)."

Effect: The *Claim 8* settlement agreement with the \$50,000 liquidated damages provision violated the confidentiality of records statute by the omission of relevant provisions setting forth statutory requirements. Applicable law may have been circumvented through the inclusion of excessive liquidated damages provisions, which effectively amounted to a \$50,000 fine for violating the settlement agreement's covenant of confidentiality. The *Claim 9* settlement agreements contained provisions for \$5,000 in liquidated damages for violations of the covenant of confidentiality also reinforced violations of the confidentiality of records statute, while requiring confidentiality for a period longer than permitted by statute.

Cause: A lack of policies and procedures, broad authority, and failure to adhere to statutory requirements may have contributed to settlement clauses in violation of statutory authority.

Recommendation: GSD's RMD should ensure that all settlement agreements follow state statutes prior to execution. Standard language referencing applicable statutory requirements should never be removed and/or replaced from settlement agreements. Liquidated damages provisions should never require any party to a settlement agreement to violate applicable statutes.

Management's Response: Under this administration, RMD does not draft or execute settlement agreements that fail to follow state statute. While RMD will continue to reference NMSA 1978, Section 15-7-9 in its settlement agreements, the purpose is to apprise parties of the law's existence, not to threaten prospective punitive action at a later date. Along those lines, RMD does not include liquidated

damages provisions in its settlement agreements, as the purpose of the settlement agreement is to bring a legal matter to its full and final closure.

Areas of Opportunity for Improvement (instances that did not rise to the level of a finding):

Opportunity 1 – Timing of the Issuance of Settlement Checks

Observation: We noted that on three (3) settlements reviewed (claims 6, 8, and 10), the settlement check invoice was dated prior to the final execution of the settlement agreement. On one (1) additional settlement (Claim 4), the settlement check invoice was dated on the same day. This practice may represent a risk regarding the proper disbursement with support of the check issued. According to GSD's RMD there are two possible reasons.

1. The check could be exchanged for the settlement agreement being signed.
2. The settlement agreement may have some dispute, other than the dollar amount. As a result, the check may be requested prior to a signed settlement agreement.

Recommendation: The OSA recommends that GSD's RMD submit the request for settlement payment to DFA when final execution of the settlement agreement has occurred.

Management's Response: The standardized procedure utilized by RMD is to submit the request for settlement payment to DFA when the final execution of the settlement agreement has occurred. In instances where a check is to be exchanged for a settlement agreement, a notation will be placed in the file by the assigned file handler.

Opportunity 2 - Settlement Agreement Clause Requiring Repayment of Debt Owed to Other Public Employees

Observation: The settlement agreement from *Claim 8* contained a "Releasors' Financial Standing" clause requiring *Complainant 8* to repay all outstanding debt obligations owed to specifically named State Police Officers no later than May 8, 2015. The requirement to use proceeds from settlement payments to repay personal debt obligations owed may be perceived as an inappropriate use of public funds.

Recommendation: RMD should evaluate the appropriateness of settlement language and requirements in conjunction with the purpose of settlements prior to execution, to ensure settlements do not require the use of public funds for what can be viewed as an inappropriate purpose.

Management's Response: While settlements vary based on the type of law and the specific negotiating interests of the signatory parties, in no event should settlements include language that contravenes law or is otherwise inappropriate. RMD does not attempt to exercise impermissible or inappropriate control over how settlement funds are used by authorized recipients.

Opportunity 3 – Confidentiality Requirements

Observation: The law covering confidentiality of records (NMSA 1978, § 15-7-9(A)(2)) provides guidelines for when the confidentiality of records period ends. Inadvertently, the law provides an opportunity to extend the confidentiality period, intentionally or unintentionally, by not administratively placing the claim on “closed status”. The risk to GSD’s RMD is that a claim will not get closed within the RMIS system timely, and the 180-day clock does not start as it should have, preventing the records from being subject to public inspection. The events triggering the 180-day clock to run are:

- (a) the date all statutes of limitation applicable to the claim have run;*
- (b) the date all litigation involving the claim and the occurrence giving rise thereto has been brought to final judgment and all appeals and rights to appeal have been exhausted;*
- (c) the date the claim is fully and finally settled; or*
- (d) the date the claim has been placed on closed status.*

Recommendation: GSD’s RMD should ensure that all settlement agreements follow state statutes prior to execution. We recommend that the GSD work with the Legislature to discuss opportunities for improvement with the existing statute. For example, NMSA 1978, Section 15-7-9(A)(2)(c) and (d) could be amended to clarify what constitutes “fully and finally settled” for the purposes of subparagraph (c), and when a claim is required to be placed on “closed status” for the purposes of subparagraph (d). In an effort to engender transparency, all settlements should be made public as soon as permissible under the applicable statute. There should be no settlement provisions providing for extended periods of confidentiality beyond the dates mandated by statute. All settlements should be made public as soon as possible after the settlement agreement is signed.

Management’s Response: Starting in July of this year, RMD and GSD convened a working group to discuss clarification efforts to the existing disclosure law in RMD’s enabling statute. What began as an internal discussion at that time now involves members of the Governor’s executive team, legislators, experts in the legal community and the Legislative Council Service. This collaborative effort will include recommendations for the Legislature to consider to amend the statute in such a way that the ambiguities in the existing language are removed, and the fear of criminal punitive action no longer weighs on the mind of a records custodian endeavoring to meet the spirit of the statute.

Opportunity 4 – Settlement of Claims Prior to the Release of an Independent Investigative Report

Observation: The OSA noted that *Claim 9* was opened on October 6, 2014 and settled on November 14, 2014. However an independent investigative firm's report related to the claim was not released until January 21, 2015. The case file provided by GSD's RMD contained no documentation explaining why the settlement was completed prior to the report date of the investigative report.

Recommendation: GSD's RMD should ensure that all investigations and other analysis of each claim are completed prior to any settlement negotiation.

Management's Response: Although it does not anticipate such a necessary sequence in the future, as an independent investigation is a crucial piece in making a determination whether to litigate or settle a claim, RMD will document occurrences in which a settlement is executed prior to the completion of an investigation.

Opportunity 5 – GSD's RMD Review of Claims/Settlements in Amounts of \$25,000 or Less

Observation: At the time of the test work for this engagement, GSD's RMD did not require a documented second review and approval/concurrence for settlements and claims made for amounts less than or equal to \$25,000.

Recommendation: We recommend that all settlements less than \$25,000 (pocket/desk authority) have a second approval or concurrence that is documented by another employee in GSD's RMD with experience to understand the reasonability of the claim and settlement. This will strengthen the review process over settlements and ultimate disposition as a second level of review will help detect errors, omissions and potentially identify other concerns.

Management's Response: RMD has established a Primary Settlement Committee whose charge is to meet weekly and to review proposed requests for authority by adjusters or attorneys in the \$25,000 and under category. The purpose of this Committee is to both bolster internal review procedure and provide adjusters/file handlers with professional development opportunities. Minutes are taken at all Committee meetings to provide for optimal file handling practices.

Opportunity 6 – GSD's RMD Review of Claims/Settlements in Amounts Between \$25,000 and \$250,000

Observation: At the time of the settlements at issue, GSD's RMD did not require a documented second review of claims/settlements for amounts between \$25,000 and \$250,000 by someone other than the GSD's RMD Director.

Recommendation: We recommend that all settlements between \$25,000 and \$249,999 have a second approval by either the Cabinet Secretary, Deputy Cabinet Secretary, Claims Committee or Legal Bureau Chief. This will strengthen the review process over settlements and ultimate disposition of the matter, as a second level of review will help detect errors, omissions and other concerns. To ensure compliance with the Government Conduct Act, the individual performing this second review should sign a statement indicating no conflicts of interest exist.

Management's Response: In January of this year, Cabinet Secretary Ken Ortiz asked that all requests for authority at \$250,000 and over be reviewed through the Office of the Secretary prior to the Director's statutory grant of authority. In September, Secretary Ortiz adjusted this amount to requests for authority at \$200,000 and over. GSD has established a Secondary Settlement Committee whose charge is to review proposed requests for authority by adjusters or attorneys in the over \$25,000 category. The purpose of this Committee is to both bolster internal review procedure and provide adjusters/file handlers with professional development opportunities. Minutes are taken at all Committee meetings to provide for optimal file handling opportunities.

Opportunity 7 – Preparation of Litigation Risk Analysis (LRA) and/or Investigation

Observation: At the time of the settlements at issue, RMD did not require a Litigation Risk Analysis (LRA) or documented investigation to be completed for settlements and claims. An investigation is pertinent to the case file to document facts obtained by an independent party regarding the claim. An LRA is pertinent to document the strengths, weaknesses and estimated cost to defend a claim. When reviewing all the facts of a case, an individual with relevant skills, knowledge and experience should see documentation that supports the conclusion of the LRA. Out of the eighteen (18) settlements reviewed, six (6) settlements did not have an LRA in the file.

Recommendation: We recommend that all claims settled over \$25,000 require an LRA and/or an investigation prior to the completion of a Request for Authority (RFA) to settle the claim. This would give RMD the decision tool to either settle a claim or litigate the claim.

Management's Response: Under this administration, RMD requires that all claims that propose settlement in an amount that exceeds \$25,000 have a litigation risk analysis by the attorney (or, if internal, the file handler) assigned to the claim. Management agrees that an LRA is critical to documenting the strengths, weaknesses and estimated costs to defend a claim. All LRAs must state, in addition to the requirements articulated in the new legal services RFP, whether an investigation is warranted, along with the reasons for such a recommendation.

Opportunity 8 – GSD's RMD Should Develop a RMIS Case File Checklist

Observation: In our review of GSD's RMD's settlement and claim files sampled, it was difficult to verify the completeness of the files. More specifically, it was difficult to follow the claims through the decision process to the ultimate settlement result.

Recommendation: We recommend that GSD's RMD develop a comprehensive checklist. This checklist would cover all items required to be included in a "claim file" within RMIS. We recommend that the checklist be completed and signed off by the relevant personnel prior to settling any claims. This would contribute to ensuring that GSD's RMD has all relevant documentation in the file to support the decisions made. The finalized checklist would be an integral part of closing a claim. Furthermore, we recommend that the checklist should include a "related party / conflict of interest" statement in which the personnel handling the claim sign off that they do not have any conflicts of interest regarding that claim. If personnel initially assigned to a case indicate there is a potential conflict of interest the case can be re-assigned immediately. This would help ensure compliance with the Government Conduct Act (NMSA 1978, § 10-16-3(C)), which requires full disclosure of real or potential conflicts of interest.

Management's Response: Earlier this year, RMD started implementation of an internal processes and procedures decision path to ensure that all claims were handled consistently and objectively. RMD will enhance this internal process to include recommendations identified in this audit. As RMIS moves through its implementation phase, RMD will develop an internal case file checklist, to be completed and maintained by its respective file handler. This checklist will be subject to secondary review by management to monitor internal performance and ensure that prior to settlement, RMD has done its due diligence on a particular claim.

Opportunity 9 – GSD's RMD Should Develop a Settlement Process Map for the Claims Process

Observation: At the time of the test work for this engagement, GSD's RMD management had in-depth knowledge of the flow and procedures related to settlements and claims. However, the process was not comprehensively documented to explain how various types of claims are directed through the claims process.

Recommendation: We recommend GSD's RMD create a "settlement process map" that will guide employees through the general process of how different types of claims are handled preliminarily. This would provide broad guidance on how to initiate the settlement process while allowing for flexibility in evaluating diverse claims, fact patterns and settlement negotiations. A settlement process map would better enable GSD's RMD employees to apply initial settlement procedures consistently, act as a general checklist for the process, and require documentation verifying the initial steps were met and by whom. Upon completion of this process if a circumstance warrants necessitating greater flexibility in the settlement process, or requiring deviation from the general process, GSD's RMD could then document the justification and move forward with evaluating each claim based on its individual merits and complexity in reaching an equitable settlement. The map can be developed in conjunction with relevant Standard Operating Procedures (SOP) so that at any given point, anyone can review the SOPs and the process map to understand how claims are generally processed by GSD's RMD.

Management's Response: Earlier this year, RMD started implementation of an internal processes and procedures decision path to ensure that all claims were handled consistently and objectively. RMD will enhance this internal process to include recommendations identified in this audit. As RMIS moves through its implementation phase, RMD will develop an internal case file checklist, to be completed and maintained by its respective file handler. This checklist will be subject to secondary review by management to monitor internal performance and ensure that prior to settlement, RMD has done its due diligence on a particular claim.

Opportunity 10 – GSD's RMD Should Develop a Claim Form

Observation: At the time of the test work for this engagement, a threatening legal letter or a civil complaint can trigger a settlement even though an official complaint has not been filed.

Recommendation: We recommend that GSD's RMD create a uniform or standardized "Complaint Form" and provide the form on the GSD website to individuals who need to file a claim with GSD's RMD. The Complaint Form should have specific fields for required information prior to allowing a complaint to proceed through the GSD's RMD claim process. This would help ensure GSD's RMD has the required information prior to moving forward with a claim.

Management's Response: While RMD cannot require that claimants file a standardized form, it already provides a claim form sheet to enable potential claimants to submit claims for review. The form will continue to be updated accordingly and is available on RMD's website.

Opportunity 11 – Documentation of Settlement Calculation

Observation: The Request for Authorities (RFA) authorized did not provide a detailed quantitative analysis to support the conclusion of the settlement amounts on the thirteen (13) out of the eighteen (18) settlements reviewed.

Recommendation: We recommend that all cases settled over \$100,000 require a projected estimate calculation of GSD's RMD's risk of exposure. The purpose of this calculation would be to document GSD's RMD potential exposure in relation to the claim. Projected estimate calculations would be used to analyze the claim and support final disposition of the matter, including any settlement amounts disbursed. Some elements that could be beneficial in the calculation include, but are not limited to:

1. Estimated trial costs: \$XXXX
2. Estimated costs to file motions: \$XXXX
3. Estimated costs of depositions: \$XXXX
4. Estimated court preparation costs \$XXXX
5. Other relevant costs \$XXXX
6. Total: \$XXXX

These estimates should include sufficient supporting documentation to justify the amounts involved.

Management's Response: A sophisticated understanding of projected legal costs is an important component of any settlement discussion. That is why RMD, as part of its new legal services RFP, included a requirement that contract firms and attorneys include in their litigation risk analysis a clear articulation of expected costs and exposures in that particular legal area. These forms will be updated from time to time to reflect the need that certain ancillary or additional costs and or considerations be represented for review.

Opportunity 12 – Documentation of Claims Committee Meeting Minutes

Observation: GSD's RMD has weekly Claims Committee meetings to discuss new and ongoing claims and settlements. However, our procedures performed suggest that the discussions and/or significant decisions being made can be better documented.

Recommendation: We recommend that meeting minutes be taken for weekly Claims Committee meetings. These minutes will document cases being handled, peer Claims Committee Member's evaluation of the cases and mutually decided approach on specific cases going forward. This will allow for multiple perspectives from highly knowledgeable and experienced team members. Documentation of such meetings should be maintained as it relates to decisions on specific claims and settlements.

Management's Response: Although GSD's RMD holds a regularly scheduled weekly claims committee, it will improve recordkeeping by taking detailed minutes at those meetings.

Exit Conference:

An exit conference was held on October 3, 2019 to discuss the results of the consulting procedures. Because the consulting report was not yet released by the Office of the State Auditor, the meeting was a closed session. Attending were the following:

Representing the GSD:

Ken Ortiz, Cabinet Secretary
Duffy Rodriguez, Deputy Cabinet Secretary
Clinton Nicley, RMD Director
Thom Cole, Public Information Officer

Representing the OSA:

Brian S. Colón, Esq., State Auditor
Natalie Cordova, CPA, Deputy State Auditor
Shawn P. Beck, MBA, CFE, Director, Special Investigations Division
David J. Mora, CFE, MBA, Audit Supervisor, Special Investigations Division

Representing KMA CPAs:

Daniel O. Trujillo, CPA, CFE, CGFM, CGMA, KMA CPAs Partner